

1 Stacie R. Hartman (admitted *pro hac vice*)
2 Mir Y. Ali (admitted *pro hac vice*)
3 SCHIFF HARDIN LLP
4 233 S. Wacker Dr. Suite 6600
5 Chicago, IL 60606
6 Telephone: (312) 258-5500
7 Facsimile: (312) 258-5600
8 Email: shartman@schiffhardin.com
9 mali@schiffhardin.com

10 Andrew F. Halaby (#017251)
11 Andrew C. Stone (#026543)
12 SNELL & WILMER L.L.P.
13 One Arizona Center
14 400 E. Van Buren
15 Phoenix, AZ 85004-2202
16 Telephone: (602) 382-6000
17 Facsimile: (602) 382-6070
18 Email: ahalaby@swlaw.com
19 astone@swlaw.com

20 Attorneys for Plaintiff

21
22 UNITED STATES DISTRICT COURT
23
24 DISTRICT OF ARIZONA

25 Market Studies, LLC, a limited liability
26 company,

27 Case No. CV 2011-01895-JAT-PHX

28 **AMENDED COMPLAINT**

Plaintiff,

v.

20 Technical Analysis, Inc., a Washington
21 corporation,

22 Defendant.

23 Plaintiff Market Studies, LLC (“MS”), by its attorneys, for its Amended Complaint
24 against Defendant Technical Analysis, Inc. (“TA”), states as follows:

25 **NATURE OF THE CASE**

26 1. This case arises out of Defendant TA’s infringement of MS’s intellectual
27 property and interference with MS’s business, all done with an intent to trade on MS’s
28 famous DeMark Indicators and profit from a false association with them. Without any
license or authority from MS, TA published and distributed the *Stocks & Commodities*

1 magazine and associated website that contained false and misleading statements about the
2 DeMark Indicators and software code that purports to be the DeMark Indicators. TA
3 offered its readers free imitation software code to circumvent MS's requirement of a
4 license to its well-respected DeMark Indicators.

5 **PARTIES**

6 2. Plaintiff MS is a Delaware limited liability company with its principal place
7 of business in Arizona. The members of MS are citizens of Arizona, Delaware, and
8 California.

9 3. Defendant TA is a Washington corporation with its principal place of
10 business in Washington.

11 **JURISDICTION AND VENUE**

12 4. This Court has subject matter jurisdiction over MS's claims for trademark
13 infringement pursuant to 28 U.S.C. §§ 1331 and 1338(a).

14 5. This Court has supplemental jurisdiction over MS's claims arising under the
15 laws of Arizona pursuant to 28 U.S.C. § 1337(a). These claims are so related to the
16 claims under federal law that they form part of the same case or controversy and derive
17 from a common nucleus of operative facts.

18 6. Additionally, this Court has subject matter jurisdiction over all claims
19 pursuant to 28 U.S.C. § 1332, in that the parties are diverse and the amount in controversy
20 exceeds the sum of \$75,000.00 exclusive of interests and costs.

21 7. Venue is proper in this Court pursuant to 28 U.S.C. § 1331(b)(2) because
22 TA's acts giving rise to MS's causes of action occurred in the District of Arizona.

23 **FACTUAL BACKGROUND**

24 8. MS provides financial research and information, education and consulting
25 services based on its analysis and compilation of data to measure the performance of
26 certain financial markets. MS provides subscription services and publishes and distributes
27 materials pertaining to the "DeMark Indicators," a suite of tools developed over 40 years
28 by Tom DeMark, an internationally known consultant and lecturer on market analysis and

1 founder and CEO of MS.

2 9. Tom DeMark has spent decades developing, refining and teaching his
3 techniques to institutional professionals around the world and has established “DeMark”
4 as the definitive name in market timing. Through MS, traders and investors may license
5 for a fee the right to use the DeMark Indicators. Thousands of companies and individuals
6 subscribe to MS’s products and services; its subscription base includes a veritable “who’s
7 who” of the investment world. Mr. DeMark has consulted with many of the largest
8 financial institutions in the world, including Goldman Sachs, Citigroup, J.P. Morgan,
9 IBM, Union Carbide, and Soros Fund Management.

10 10. In recognition of his contributions, Mr. DeMark is regularly asked to appear
11 on television broadcasts (such as Bloomberg TV and CNBC), and both Mr. DeMark and
12 the DeMark Indicators have been featured in a plethora of articles, including Bloomberg
13 Magazine and Futures & Options Magazine, among many others. Mr. DeMark has also
14 authored three best-selling books on the DeMark Indicators and market timing: *The New*
15 *Science of Technical Analysis*; *New Market Timing Techniques: Innovative Studies on*
16 *Market Rhythm and Price Exhaustion*; and *DeMark on Day Trading Options*.

17 11. MS owns federal trademark rights in the DeMark Indicators SEQUENTIAL,
18 SETUP, and COUNTDOWN for financial analysis, publications, and education related to
19 investment, among other classes. These U.S. Trademark Registrations are attached as
20 Exhibit 1.

21 12. The DeMark Indicators are, and at all relevant times were, strong, famous
22 and distinctive marks. MS has used the marks in interstate commerce throughout the
23 United States for many years to promote its products and services.

24 13. MS’s commercial use of the marks commenced at least as early as 1995.
25 MS has used the marks continuously in advertising and promoting its services.

26 14. MS has never licensed to TA the right to use any of MS’s proprietary
27 material or intellectual property.

28 15. TA itself recognizes the value in the DeMark name. TA first published an

1 article about the DeMark Indicators in 1995, and has since published numerous cover
 2 stories and articles on Tom DeMark and the DeMark Indicators.

3 16. TA publishes a monthly magazine entitled *Technical Analysis of Stocks &*
 4 *Commodities* (“*Stocks & Commodities*”). TA also publishes *Stocks & Commodities*
 5 electronically via the Internet at its website traders.com. TA also publishes computer
 6 software code, which is used with affiliated financial platforms.

7 17. MS provides subscription services and publishes and distributes materials
 8 pertaining to the DeMark Indicators on authorized institutional financial platforms, over
 9 the internet and in print media. TA uses the same marketing channels.

10 TA's Infringing Publication

11 18. On September 19, 2011, MS discovered that the September 2011 issue of
 12 *Stocks & Commodities* included an article entitled “TD Sequential and Ermanometry for
 13 Intraday Traders” authored by Andrew Coles (the “Coles Article”). TA published
 14 additional statements and software code related to the DeMark Indicators in the “Traders’
 15 Tips” section of the magazine and on the traders.com website. True and correct copies of
 16 the Coles Article and the associated Traders’ Tips are attached hereto as Exhibits 2 and 3.

17 19. Traders’ Tips used the trademarked DeMark Indicators to refer to imitation
 18 software code that is incomplete, inaccurate, and not from or associated with MS, the
 19 legitimate holder of the trademarks. For example, downloadable file names for various
 20 codes are identified as: TDSetup.efs, Countdown.eqi, and tasc_tdsequentialsetup.vtscr.
 21 These references ensure that the downloaded applications will be labeled with MS’s
 22 trademarks. The knock-off code can be downloaded from TA’s website and is pre-
 23 compiled software that the user will see as pre-packaged code for the DeMark Indicators.
 24 Further, the code published by TA is littered with references to the trademarked
 25 Indicators, such as “Buy Setup,” “Sell Setup,” “BuySetUp,” “SellSetUp,” “TD Sell
 26 Setup,” “TD Sequential Setup,” “TD BuySetup,” “TD Sell Setup,” “TD Sequential – Buy
 27 Setup,” “TD SequentialBuy,” “TD Sequential – Sell Setup,” “TD SequentialSell,” “Tom
 28 DeMark TD Sequential Setup” and “Source Code for the Count Down Indicator.”

20. Readers will be misled into thinking the knock-off code presented in the publications represents the code to implement the genuine DeMark Indicators.

21. TA actively solicits others to write the knock-off code that it publishes.

22. If readers use the code TA has published, they will not receive the same market analysis results derived from the true DeMark Indicators.

TA's Trademark Infringement

23. TA's publications used MS's registered trademarks for DeMark Indicators SEQUENTIAL, SETUP, and COUNTDOWN to identify products and services provided by parties other than MS.

24. TA published the Coles Article and Traders' Tips, using the marks, after MS had established goodwill for the marks.

25. MS's marks are recognized in the marketplace as distinctive and as identifying MS's goods and services to customers and potential customers.

26. TA's use of MS's marks and other nearly identical marks has created confusion in the marketplace, causing MS injury and damages.

27. TA's publication using the marks is confusingly similar to MS's registered trademarks, for which MS has priority of use.

28. Use of the marks is likely to cause confusion, mistake or deception as to the affiliation, connection or association of third parties with MS.

29. MS contacted TA by email on September 19 and 20, 2011 and by telephone on September 21, 2011, notifying TA of the infringement and requesting that TA remove the infringing material from the traders.com website. On September 22, 2011, MS again demanded that TA stop infringing MS's intellectual property rights. TA first asked for time to review the issue. Ultimately, TA ignored MS's demand.

30. MS has never licensed to TA the right to use the marks. TA has used the marks without authorization. TA has continued to use MS's trademarks without license or authority from MS.

31. Use of MS's marks is willful, deliberate and committed with knowledge of

1 MS's rights.

2 32. The injuries and damages MS has sustained have been directly and
3 proximately caused by wrongful misappropriation of MS's marks.

4 **COUNT I – INFRINGEMENT OF TRADEMARKS**
5 **SEQUENTIAL, SETUP, AND COUNTDOWN**

6 33. MS realleges and incorporates by reference the preceding paragraphs as if
7 fully set forth herein.

8 34. TA's unauthorized use of the SEQUENTIAL, SETUP, and COUNTDOWN
9 trademarks in interstate commerce in connection with the offering of software code was
10 and is likely to cause confusion, mistake, or deception in violation of Section 32 of the
11 Lanham Act, 15 U.S.C. § 1114.

12 35. TA's conduct has caused and will continue to cause confusion in the market
13 for investment and financial services, because readers will be misled into thinking the
14 marks and associated code in the publications are the true DeMark Indicators.

15 36. MS has suffered damages by TA's acts.

16 37. TA willfully and deliberately infringed the marks. Under such
17 circumstances, damages should be increased by three times the actual damages, and
18 reasonable attorneys' fees and costs should be assessed under 15 U.S.C. § 1117.

19 **COUNT II – VIOLATION OF LANHAM ACT,**
SECTION 43(a) – FALSE DESIGNATION OF ORIGIN

20 38. MS realleges and incorporates by reference the preceding paragraphs as if
21 fully set forth herein.

22 39. Continuing use of the marks by TA in interstate commerce is likely to cause
23 confusion, mistake or deception as to the affiliation, connection or association of
24 unlicensed third party indicators with MS or as to the origin, sponsorship, or approval of
25 the third party indicators and services by MS.

26 40. MS has been damaged by these acts, all in violation of Section 43(a) of the
27 Lanham Act, 15 U.S.C. § 1125.

28 41. This case is an exceptional case pursuant to 15 U.S.C. § 1117.

COUNT III – UNFAIR COMPETITION

42. MS realleges and incorporates by reference the preceding paragraphs as if fully set forth herein.

43. TA's conduct constitutes palming off and unfair competition under Arizona law.

44. TA's conduct has caused and will continue to cause irreparable injury to MS, its business reputation and the goodwill associated with MS's trademarks and its products and services. MS has no adequate remedy at law. MS will continue to be irreparably injured unless and until TA is enjoined from the unlawful conduct.

COUNT IV – UNJUST ENRICHMENT

45. MS realleges and incorporates by reference the preceding paragraphs as if fully set forth herein.

46. By utilizing MS's intangible property, including the content of and goodwill associated with the "DeMark Indicators" tools, TA has benefitted in the financial services market at the expense of MS and diverted and will continue to divert substantial profits from MS.

47. Because TA is not a licensee of MS, it is not entitled to retain the profits derived from this unauthorized use of MS's products and reputation.

48. TA's conduct constitutes unjust enrichment under Arizona law.

COUNT V – INTENTIONAL INTERFERENCE WITH A BUSINESS RELATIONSHIP

49. MS realleges and incorporates by reference the preceding paragraphs as if fully set forth herein.

50. MS has a business expectancy to maintain its clients and licensees and to obtain additional clients and licensees based on the reputation and success of the DeMark Indicators.

51. TA is aware that MS relies on the accurate representation of the DeMark Indicators to generate business and maintain its reputation in the financial services market.

1 52. On information and belief, TA intentionally interfered with MS's business
2 expectancies by publishing the Traders' Tips knowing the publications contained
3 inaccurate and misleading representations of the DeMark Indicators.

4 53. TA's acts have injured MS by limiting its expected business related to the
5 true DeMark Indicators.

6 54. TA's conduct constitutes intentional interference with a business
7 relationship under Arizona law.

8 WHEREFORE, MS requests that relief be granted in its favor and against TA for
9 (a) damages sustained by MS, including TA's profits, MS's lost profits, loss of business
10 expectancy, injury to reputation and loss of goodwill in an amount to be determined at
11 trial, (b) statutory damages, (c) punitive damages, (d) attorneys' fees and costs, (e) a
12 permanent injunction requiring TA to refrain from any use of MS's trademarks without
13 prior authorization from MS, and (f) such other and further relief as the Court deems just
14 and proper.

JURY DEMAND

MS hereby demands a trial by jury as to all issues so triable.

DATED this 10th day of April, 2012.

SCHIFF HARDIN LLP

By s/ Stacie R. Hartman
Stacie R. Hartman
Mir Y. Ali
233 S. Wacker Dr. Suite 6600
Chicago, IL 60606

SNELL & WILMER L.L.P.

Andrew F. Halaby
Andrew C. Stone
400 East Van Buren
Phoenix, Arizona 85004-2202

Attorneys for Market Studies, LLC

CERTIFICATE OF SERVICE

I hereby certify that on April 10, 2012, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrations:

David J. Bodney
Peter S. Kozinets
STEPTOE & JOHNSON LLP
201 East Washington Street, Suite 1600
Phoenix, Arizona 85004-2382
Attorneys for Defendant Technical Analysis, Inc.

/s/ Mir Y. Ali